A melody for legal reform?

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In *Crimes Against Humanity,* Kerstin von Lingen proposes a twofold argument about the history of the eponymous concept. First, von Lingen emphasizes the longue-durée history of crimes against humanity as a moral and political concept. Since the mid-nineteenth century, it circulated in various “arenas of juridification” like the St. Petersburg Conference (1868), the Brussels Conference (1874), and especially the 1899 and 1907 Hague Peace Conferences. The First World War brought with it a series of blunted firsts. In a 1915 telegram for example, the governments of France, Great Britain and Russia condemned the Ottoman Empire for crimes against humanity, marking the first-ever use of the concept in a diplomatic document. But the telegram barely resonated and spurred no legal action. Throughout her book, von Lingen highlights the role of civil society in the concept’s history and its deeper embedment within the history of the laws of war, thereby decentering the singular influence of the military victors and their lawyers in 1945.

Von Lingen insists on the importance of the Martens Clause to the history of crimes against humanity, an entanglement that gestures towards larger questions of the entwined temporalities of history and law, and their political implications. Devised in 1899, the Martens Clause placed populations and combatants under the protection of “the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of public conscience […] until a more complete code of the laws of war is issued.”

The metronome of legal reform

Second, in the 1940s, “semi-peripheral” international lawyers and diplomats in exile from the occupied states of Europe worked towards the juridification of crimes against humanity through a series of organizations in and around London. The work of these organizations—the Cambridge Commission, the London International Assembly (LIA), and especially the United Nations War Crimes Commission (UNWCC)—created the conceptual preconditions for the prosecution of German and Japanese leaders for crimes against humanity at the Nuremberg and Tokyo trials.

The UNWCC was, to use von Lingen’s metaphor, the “metronome” [*Taktgeber*, 297] of international legal reform in the 1940s. British and U.S. officials often deferred to or even defended state sovereignty – in a particularly striking citation, von Lingen quotes British Foreign Minister Anthony Eden as coldly saying that nothing was to be done about Buchenwald, as “crimes committed by Germans against Germans, however reprehensible, are in a different category from war crimes and cannot be dealt with under the same procedure” (306).

Meanwhile, the UNWCC – the Czech jurist and politician Bohuslav E#er in particular – kept setting impulses. It was the UNWCC that reanimated crimes against humanity from its interwar hiatus, using it in a 1944 meeting to describe the legal responsibility

of the Nazi leadership for crimes committed in German territories against German citizens. Here, the concept was for the first time defined in a way that made it useful as a tool for criminal prosecution, a breakthrough that would continue in fits and starts at the Nuremberg and Tokyo Trials, and culminate in the International Criminal Tribunals for the Former Yugoslavia (1993) and Rwanda (1994).

The triad of the Martens Clause

If the UNWCC was the metronome of legal reform, the Martens Clause supplied the "triad" [*Dreiklang*, 337] that animated its melody: civilization, the laws of humanity, and public conscience. The centrality of the Martens Clause to von Lingen's history of crimes against humanity raises puzzling questions about the conflicting temporalities of law and history, how law uses history, and vice versa.

The Martens Clause's future-oriented capaciousness of progressive completeness and the universal valence of "humanity" meant that again and again, jurists returned to the Martens Clause to legitimize new law by grounding it on old principles. In 1942, German-Jewish jurist-in-exile Georg Schwarzenberger based his appeal for the international recognition of all actions running counter to international law as crimes on the Martens Clause (293). In 1944, E#er emphasized that the Martens Clause and its central concept of humanity were still at the very heart of international law. These are examples of lawyers using past law, drawing on the prestige of well-known declarations to propose reform. There is a fascinating tension, here, between the centrality of sovereignty in the Hague Rules of Land Warfare and the use of the Martens Clause by lawyers in the 1940s to articulate legal principles that reached beyond sovereignty.

Von Lingen not only records the historical uses of the Martens Clause, she also interprets the historical record through its triad. When Marcel de Baer reached out to Lord Maugham in 1942 to advocate for an international criminal court in the House of Lords, he engaged the public "in line with the third element of the Martens Clause" – public conscience – von Lingen maintains (257). When Lord Wright and the UNWCC advocated that crimes against humanity should be a universal concept applicable to the Holocaust and to other future mass atrocities as well, this was "clearly reminiscent of the universalist aspirations of the Martens Clause" (316). And when UNWCC Chair Sir Cecil Hurst advocated for the work of his organization to be given broader scope in 1944, he legitimized this step with reference to the "public mind," which amounted to "an explicit reference to 'public conscience,' an element known from the Martens Clause" (296).

The Martens Clause and historical narrative

These are examples of Kerstin von Lingen, a professor of contemporary history at the University of Vienna, taking up law to structure historical narrative and bring order into a messy conceptual universe. In *Crimes Against Humanity*, civilization, the laws of humanity, and public conscience seem neatly anchored in the Martens Clause. But it is a deceptive tidiness. After all, the concepts of the "triad" were used in a great number of other nineteenth-century legal documents and circulated widely beyond them as well. They were basic concepts (*Grundbegriffe*) in their own

right, unwieldy and capacious. By affixing the intellectual history of crimes against humanity to the Martens Clause, von Lingen foregoes a more thorough treatment of the multilayered conceptual histories of civilization, humanity, and public conscience.

Most provocatively, when documents are silent on the Martens Clause and its constituent concepts, von Lingen nevertheless reads them into history. She admits, for example, that the final report of the LIA did not mention the term humanity, but still insists that "the universalist aspirations of the Martens Clause are tangible," in concepts like the "laws of mankind" perhaps, or the appeal to "certain standards" below which public morality ought not fall (255). I, too, see the final report's universalist aspirations, but am troubled by the interpretive connection of the LIA report to the Martens Clause. What are the stakes of such a connection, and to what extent does it overstate the importance of the Martens Clause to the history of crimes of humanity?

It is one thing to describe how jurists turned to a foundational document to legitimize attempts at international legal reform. But to structure history according to the progressive logic of this foundational document is to replicate the lawyers' legitimizing impulse, only here not to bolster reform but rather to celebrate the Martens Clause itself. In an article in 2000, Italian jurist Antonio Cassese called the Martens Clause a "legal myth." This myth remains intact in *Crimes Against Humanity.*

Pluralities of the legal

Equally perplexing is the concept of the legal in *Crimes Against Humanity*. Even in its primarily moral and political incarnations, crimes against humanity was bound up with juridification debates, and yet von Lingen insists that it only became a legal tool in the 1940s. I want to propose a more pluralistic concept of law and the legal, one that makes room for diachronic change and synchronic multilayeredness. Similarly, I wished for more of an explanation of what, to von Lingen, makes a concept either moral or political, and what the stakes of such a binary distinction are compared to thinking through the moral politics (*Moralpolitik*) of crimes against humanity.

Lastly, I grapple with the consequences of a narrowly defined concept of the legal for the overall narrative of *Crimes Against Humanity*. If crimes against humanity only became a legal concept during the Second World War, its earlier history, notwithstanding all insistence on the importance of the nineteenth century, becomes a kind of pre-history. The movement from the nineteenth century to Nuremberg, then, becomes an act of modernization (*Modernisierung*, e.g. 138, 168) and, cautiously, even progress (*Fortschritt*, e.g. 168). This modernization narrative leaves little room for the ambivalences of the ever-increasing legal codification and institutionalization of the last 160 years. It takes up the impulse of the Martens Clause toward a "more complete code" without reflecting on its particular historicity – after all, the Martens Clause was added to the Hague Rules of Land Warfare over irreconcilable disagreements about the status of francs-tireurs under international law.

Despite these questions, *Crimes Against Humanity* provides an important revisionist history of crimes against humanity in the eighty-odd years after the founding of the Red Cross. The monograph particularly shines in its detailed treatment of the work of jurists-in-exile in London during the Second World War, and its discussion of the foundational period of modern international law since the mid-nineteenth century.
